

**STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE MINNESOTA ENVIRONMENTAL QUALITY BOARD**

**In the Matter of The Exemption  
Application By Minnesota Power For A  
345/230 kV High Voltage Transmission  
Line Known As The Arrowhead Project  
MEQB Docket No. MP-HVTL-EA-1-99**

**ORDER ON MOTION TO CERTIFY**

The second prehearing conference in the above matter, held on Monday, January 24, 2000, at the Midway Town Hall, 3230 Midway Road, Duluth, Minnesota. A third prehearing conference was held by telephone conference call on Thursday, January 27, 2000 at 11:00 A.M.

All parties on the attached Service List either attended or had the opportunity to participate in at least one of the two prehearing conferences. On January 24, 2000, North American Water Office (NAWO) made an oral and written motion to certify the issue of the scope of evidence in this proceeding to the Minnesota Environmental Quality Board (Board). That motion was supplemented by a letter memorandum filed on January 24, 2000 by NAWO. A briefing schedule on this motion was arrived at during the January 27, 2000 prehearing conference, and set out in the January 31, 2000 prehearing order in this matter.

Briefs regarding this motion were filed with the Administrative Law Judge until January 31, 2000. Reply briefs were filed until February 3, 2000 when the record closed on this motion.

Based upon briefs submitted by with counsel and parties, and the information in the record of this matter and for the reasons set forth in the accompanying memorandum,

**IT IS HEREBY ORDERED AS FOLLOWS:**

1. This matter is certified to the Environmental Quality Board for resolution of the question whether evidence of potential human and environmental impacts outside of Minnesota should be included in the hearing record and used in the assessment of whether the requested exemption should be granted.
2. All deadlines currently in place under the previously issued scheduling orders are not suspended but will continue, pending resolution by the Board of the certified question. If the Board expands the scope of the hearing to include health and

environmental impacts outside of Minnesota, then the hearing schedule will be suspended, and the parties will be given additional time to supplement their filings and the hearing will be rescheduled.

Dated this 7th day of February, 2000.

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PHYLLIS A. REHA  
Administrative Law Judge

### MEMORANDUM

This matter is brought under the Power Plant Siting Act (Minn. Stat. §§ 116C.51-.68). The contested case process under which such hearings are conducted is Minn. Rule Chapter 1405. The rule on motions in that chapter states:

No motions shall be made directly to or be decided by the board subsequent to the appointment of an administrative law judge and prior to the completion and filing of the administrative law judge's report unless the motion is certified to the board by the administrative law judge. Uncertified motions shall be made to the administrative law judge and considered by the board in its consideration of the record as a whole subsequent to the filing of the administrative law judge's report.<sup>[1]</sup>

The rule lacks any reference to what standards should be applied in certifying questions to the Board for resolution. The practice of the Office of Administrative Hearings in such circumstances is to apply the next broader set of applicable rules. In this instance, that means using the contested case rules of Minn. Rule Chapter 1400. In those rules, applicable to all contested cases<sup>[2]</sup>, motions to certify are governed by Minn. Rule 1400.7600. That rule sets out the following factors that must be considered:

- A. whether the motion involves a controlling question of law as to which there is substantial ground for a difference of opinion; or
- B. whether a final determination by the agency on the motion would materially advance the ultimate termination of the hearing; or
- C. whether or not the delay between the ruling and the motion to certify would adversely affect the prevailing party; or

- D. whether to wait until after the hearing would render the matter moot and impossible for the agency to reverse or for a reversal to have any meaning; or
- E. whether it is necessary to promote the development of the full record and avoid remanding; or
- F. whether the issues are solely within the expertise of the agency.<sup>[3]</sup>

The parties and intervenors each addressed issues arising under some of these six factors. Each factor will be discussed individually.

### **Controlling Question of Law**

The first factor is whether the issue to be certified poses "a controlling question of law as to which there is substantial ground for a difference of opinion."<sup>[4]</sup> NAWO asserts that the scope of this proceeding must take into account environmental and human impacts occurring beyond the borders of Minnesota. Minnesota Power maintains that the EQB's jurisdiction is established by Minn. Stat. § 116C.57, subd. 4(2) as consideration of the "land, water, air and human resources of the state" and that statute should not be read to include effects going beyond the State.

SOUL disputes the scope of the consideration being given to human and environmental impacts, citing a recent transmission line case and the Sherco 3 power plant siting matter.<sup>[5]</sup> In both those cases, out-of-state impacts are part of the hearing record. WOLF pointed out Minnesota Power had cited the power needs in both the MAPP and MAIN regions (very large multistate areas supplied by electrical utilities) as supporting the need for the project.<sup>[6]</sup>

Minnesota Power maintains that the difference in subject matter makes the Sherco 3 case inapposite and questions of need are addressed outside the Board process.<sup>[7]</sup> The arguments are not directed toward the facts of each case but toward the precedent of considering impacts beyond those immediately adjacent to the proposed site. The prior cases support a conclusion that the Board can consider broad impacts.

MEQB Staff characterized the potential for some important issues to go unaddressed by applying a limited scope to this proceeding. These "gaps in the law" include the inapplicability of any individual state process to address interstate issues.<sup>[8]</sup> The Board prior to issuing the Notice of Hearing in this matter did not discuss jurisdiction over wider issues.<sup>[9]</sup> Thus, the issue of jurisdiction was not considered in light of the broader potential impacts of the proposed project.

SOUL asserts that the overall scope of the project, 262 miles of transmission line, is inconsistent with the limited review for projects that qualify for exemption from the siting process. With the Minnesota portion of the project being only a small fraction of the entire project, there is a significant policy issue raised by Minnesota Power's request for exemption. Agencies have the discretion to consider wide-ranging impacts when making decisions.<sup>[10]</sup> Examining impacts from the project as a whole, rather than those from the portion in Minnesota, could be justified under these circumstances.

The purpose of this proceeding is to determine whether significant environmental or human impacts arise from the proposed modification of the Arrowhead electrical transmission line. Limiting the scope of the proceeding to effects identified within Minnesota has a significant potential to exclude relevant evidence of environmental or human impacts occurring elsewhere. The foregoing discussion of the parties' and intervenors' positions on this issue demonstrate legitimate differences of opinion based on statutory interpretation and case law. The Board should have the opportunity to meaningfully consider whether its obligation to consider human and environmental impacts, imposed by statute, should include impacts outside of Minnesota. The question to be certified meets the controlling question of law factor.

### **Materially Advance the Ultimate Termination of the Hearing**

The second factor for certification is whether final resolution of the issue will "materially advance the ultimate termination of the hearing."<sup>[11]</sup> The intervenors to this action have indicated the need for introducing evidence regarding impacts on humans and the environment from outside of Minnesota. It is likely that efforts will be made to introduce such evidence and equally likely that Minnesota Power will seek to prevent its introduction. The end result of such efforts by all sides would be to impede the swift resolution of this proceeding.

In addition to the potential for increasing conflicts, without a final agency decision on the scope issue, the potential arises for having to conduct the hearing on environmental or human impacts twice. The ultimate termination of the hearing is not advanced if it must occur once for Minnesota impacts and again for those impacts excluded by the scope order, but later deemed relevant to the Board's decision.

### **Delay**

The third factor to be considered is "whether or not the delay between the ruling and the motion to certify would adversely affect the prevailing party."<sup>[12]</sup> Minnesota Power expressed concern over the possibility of "delay and disruption" in the event of certification.<sup>[13]</sup> Lake Superior Greens responded that the Board was ready to take up the question within ten days of the issuance of the certification order.<sup>[14]</sup> NAWO and Lake Superior Greens pointed out that Minnesota Power had not indicated how it would suffer from this delay.<sup>[15]</sup>

In this instance, the certification motion has been timed to cause the least disruption if granted. The delay caused by certifying the question is minimal and avoids the potential for much longer delay through duplication of the evidentiary phase of this proceeding. No particular prejudice has been identified by any party as arising due to the modest delay imposed by certifying this issue to the Board. Compared to all other aspects of this proposed project the delay caused by certification of this issue to the Board is minimal.

### **Mootness**

The fourth factor is "whether to wait until after the hearing would render the matter moot and impossible for the agency to reverse or for a reversal to have any meaning."<sup>[16]</sup> As discussed in the paragraphs above, the Board can, after the hearing in this matter, conclude that non-Minnesota impacts should have been admitted to the record and remand the matter for hearing on those impacts. Therefore, the issue cannot become moot or meaningless by waiting until after the hearing.

### **Development of a Full Record**

The opposite of the mootness factor is set out in item E which considers "whether it [certification] is necessary to promote the development of the full record and avoid remanding." The analysis of item A concluded that there is a legitimate difference of opinion as to the scope of the evidence to be considered in this proceeding. The only means to ensure that a full record is developed and remand is avoided is to certify the question to the Board.<sup>[17]</sup>

### **Agency Expertise**

Item F sets out the sixth factor to be considered as "whether the issues are solely within the expertise of the agency." The issue presented in this certification motion is whether the Board has the jurisdiction to consider certain evidence. To the extent that this question involves agency discretion, the Board is the only body that can initially answer this question.<sup>[18]</sup> As analyzed in the paragraphs on item A, the issue of scope also includes questions of policy that may not have been considered in beginning this hearing process. The issue presented by this certification motion falls within the sole expertise of the agency and thus supports certification.

### **Summary**

Five of the six factors in Minn. Rule 1400.7600 favor certification of the jurisdiction question. Only the lack of mootness stands against certification and that factor is outweighed by the potential for delay and duplicated effort in conducting the hearing on this issue. Therefore, the ALJ concludes that NAWO's motion to certify should be GRANTED.

P.A.R.

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<sup>[1]</sup> Minnesota Rule 1405.2200.

<sup>[2]</sup> See Minnesota Rule 1400.5200.

<sup>[3]</sup> Minnesota Rule 1400.7600.

<sup>[4]</sup> Minnesota Rule 1400.7600.A.

<sup>[5]</sup> SOUL Brief, at 6.

<sup>[6]</sup> WOLF Memorandum, at 1.

<sup>[7]</sup> Minnesota Power Reply, at 5.

<sup>[8]</sup> MEQB Staff Memorandum, at 8.

<sup>[9]</sup> *Id.* at 7.

<sup>[10]</sup> ***In the Matter of the Quantification of Environmental Costs***, 578 N.W.2d 794, 801-02 (Minn. App. 1998)(Arguments from **out-of-state** CO<sub>2</sub> producers that 200 mile range would be overly burdensome was held to be an appropriate basis for modifying the standard).

<sup>[11]</sup> Minnesota Rule 1400.7600.B.

<sup>[12]</sup> Minnesota Rule 1400.7600.C.

<sup>[13]</sup> Minnesota Power Memorandum, at 3.

<sup>[14]</sup> Lake Superior Greens Reply, at 1.

<sup>[15]</sup> NAWO Memorandum, at 2; Lake Superior Greens Reply, at 1.

<sup>[16]</sup> Minnesota Rule 1400.7600.D.

<sup>[17]</sup> While MEQB Staff have suggested that other options, such as reconsideration of the scoping order can be taken, the only motion that is properly before the ALJ is for certification. See MEQB Staff Memorandum, at 3.

<sup>[18]</sup> Of course, upon a final agency decision being reached, the decision is subject to appellate review. Minn. Stat. § 14.63.